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United States
Merit Systems Protection Board

An Introduction to the MSPB

March 1991

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Merit Systems Protection Board

An Introduction to the MSPB

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Background and Mission

The MSPB serves as the guardian of Federal merit systems.

The U.S. Merit Systems Protection Board is an independent agency in the Executive branch of the Federal Government that serves as the guardian of Federal merit systems. The Board's mission is to ensure that Federal employees are protected against abuses by agency management, that Executive branch agencies make employment decisions in accordance with the merit system principles, and that Federal merit systems are kept free of prohibited personnel practices.

The Board accomplishes its mission by:

- Hearing and deciding employee appeals from agency actions;
- Hearing and deciding cases brought by the Special Counsel involving alleged abuses of the merit systems, and other cases arising under the Board's original jurisdiction;
- Conducting studies of the civil service and other merit systems in the Executive branch to determine whether they are free of prohibited personnel practices; and
- Providing oversight of the significant actions and regulations of the Office of Personnel Management (OPM) to determine whether they are in accord with merit system principles and free of prohibited personnel practices.

The Board's roots go back to 1883, when Congress passed the Pendleton Act establishing the Civil Service Commission and a merit-based employment system for the Federal Government. The Pendleton Act grew out of the 19th century reform movement to curtail the excesses of political patronage in Government. Initially, the work of the Civil Service Commission centered on rules for merit selection. During the first half of the 20th century, however, the Commission developed into an omnibus personnel agency, managing a full range of employment matters. With the enactment of legislation prescribing procedures for discharging civil service employees, the Commission also developed a system for resolving employee appeals from various agency adverse personnel actions.

The Civil Service Reform Act of 1978 replaced the Civil Service Commission with three new independent agencies: the Office of Personnel Management, the Federal Labor Relations Authority, and the Merit Systems Protection Board.

As the Commission's responsibilities multiplied, a growing consensus emerged that the Commission could not properly and adequately perform managerial and adjudicatory functions simultaneously. Concern over the inherent conflict of interest in the Commission's role as both rulemaker and judge was a principal motivating factor behind the enactment by Congress, in 1978, of the Civil Service Reform Act (CSRA). The Act, which became effective January 11, 1979, replaced the Civil Service Commission with three new independent agencies: the Office of Personnel Management, which manages the Federal work force; the Federal Labor Relations Authority, which oversees Federal labor-management relations; and the Board.

The Board assumed the employee appeals functions of the Commission and was given the new responsibilities to perform merit systems studies and to review the significant actions of OPM. The CSRA also created the Office of Special Counsel, which investigates allegations of prohibited personnel practices, prosecutes violators of civil service rules and regulations, and enforces the Hatch Political Activities Act. Though established as a part of the Board, the Special Counsel has functioned independently, and in July 1989 it became an independent Executive branch agency.

The Board assumed the employee appeals function of the Civil Service Commission and was given new responsibilities to perform merit systems studies and to review the significant actions of OPM.

The bipartisan Board consists of a Chairman, a Vice Chairman, and a Member, with no more than two of its three members from the same political party. Board members are appointed by the President, confirmed by the Senate, and serve overlapping, non-renewable 7-year terms. A member of the Board may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office.

The Board's headquarters is in Washington, DC. It has regional offices in 11 major cities. (The Board's regional offices and the geographic areas they serve are listed at the end of this publication.)

The Merit System Principles and Prohibited Personnel Practices

The CSRA, for the first time, codified the basic merit principles governing Federal personnel management. Summarized, they are:

The Merit System Principles

- Recruitment should try to achieve a work force made up of qualified people from all segments of society, and selection and promotion should be based solely on merit, after fair and open competition.

- All employees and applicants should be treated fairly, without discrimination, and with proper regard for their privacy and constitutional rights.

- Equal pay should be provided for work of equal value, with appropriate consideration for the rates paid by private sector employers, and appropriate incentives and recognition should be provided for excellent performance.

- Employees should maintain high standards of integrity, conduct, and concern for the public interest.

- The Federal work force should be used efficiently and effectively.

- Retention should be based on performance, inadequate performance should be

corrected, and employees who cannot or will not improve their performance to meet required standards should be separated.

- Employees should be provided effective education and training in order to achieve better organizational and individual performance.

- Employees should be protected against partisan politics and may not use their offices for partisan political purposes.

- When employees legally disclose information evidencing wrongdoing (known as "whistleblowing"), they should be protected from reprisal.

Prohibited Personnel Practices

The CSRA also set forth prohibited personnel practices that, when engaged in, are a basis for disciplinary action against responsible agency officials. An employee who appeals a personnel action to the Board may raise the affirmative defense that the action resulted from a prohibited personnel practice. Summarized, the prohibited personnel practices are:

- Discrimination on the basis of race, color, religion, sex, national origin, age, handicapping condition, marital status, or political affiliation;

- Soliciting or considering statements concerning a person under consideration for a

personnel action unless the statement is based on personal knowledge and concerns the person's qualifications and character;

- Coercing the political activity of any person, or taking any action as a reprisal for a person's refusal to engage in political activity;
- Deceiving or willfully obstructing anyone from competing for employment;
- Influencing anyone to withdraw from competition for any position, whether to help or hurt anyone else's employment prospects;
- Giving unauthorized preferential treatment to any employee or applicant;
- Nepotism;
- Taking or failing to take, or threatening to take or fail to take, a personnel action because of an individual's legal disclosure of information evidencing wrongdoing ("whistleblowing");
- Taking or failing to take, or threatening to take or fail to take, a personnel action because of an individual's exercising any appeal, complaint, or grievance right; testifying or lawfully assisting any individual in the exercise of any appeal, complaint, or

Prohibited Personnel Practices

grievance right; cooperating with or disclosing information to an agency Inspector General or the Special Counsel; or refusing to obey an order that would require the individual to violate a law;

- Discriminating on the basis of personal conduct that does not adversely affect the performance of an employee or applicant or the performance of others, except that an employee or applicant's conviction for a crime may be taken into account in determining suitability or fitness; and

- Taking or failing to take any other personnel action if the act or omission would violate any law, rule, or regulation implementing or directly concerning the merit system principles.

Prohibited Personnel Practices

MSPB Appellate Jurisdiction

The CSRA authorized the Board to hear appeals of various agency actions, including appeals previously heard by the Civil Service Commission and appeals arising from new causes of action created by the CSRA. Certain other actions may be appealed to the Board under OPM regulations. Since a principal purpose of the CSRA was to streamline Federal personnel management, the Congress did not make all personnel actions appealable to the Board. However, some actions that are not appealable to the Board may be appealable to OPM or may be covered by agency grievance procedures.

Since a principal purpose of the Civil Service Reform Act was to streamline Federal personnel management, the Congress did not make all actions appealable to the Board.

If a personnel action involves a prohibited personnel practice, regardless of whether the action is appealable to the Board, the employee may file a complaint with the Special Counsel, asking that the Special Counsel seek corrective action from the Board. Under the Whistleblower Protection Act of 1989, an individual who alleges that a personnel action was taken, or not taken, or threatened, because of his or her "whistleblowing" may seek corrective action from the Board directly if the Special Counsel does not seek corrective action on his or her behalf.

The majority of the cases brought to the Board are appeals of agency adverse actions — that is, removals, suspensions of more than 14 days, reductions in grade or pay, and furloughs of 30 days or less. The next largest number of cases involve

appeals of OPM determinations in retirement matters. Other types of actions that may be appealed to the Board include: performance-based removals or reductions in grade, denials of within-grade salary increases, reduction-in-force actions, OPM suitability determinations, OPM employment practices (the development and use of examinations, qualification standards, tests, and other measurement instruments), denials of restoration or reemployment rights, and certain terminations of probationary employees.

A "mixed case" is one in which the employee alleges discrimination in connection with an action otherwise appealable to the Board.

Additional jurisdictional issues arise where the employee alleges discrimination in connection with an action otherwise appealable to the Board (a "mixed case"). While the Board has jurisdiction over such appeals, the employee, if dissatisfied with the final decision of the Board, may ask the Equal Employment Opportunity Commission (EEOC) to review the Board's decision. If the EEOC and the Board cannot reach agreement, the case is referred to the Special Panel for final resolution. (The Special Panel is made up of a Chairman appointed by the President, one member of the Board appointed by the MSPB Chairman, and one EEOC commissioner appointed by the EEOC Chairman.) A discrimination complaint in connection with an action that is not appealable to the Board may be pursued through internal agency procedures and the EEOC.

There are also additional jurisdictional issues when the employee is a member of a bargaining unit that has a negotiated grievance procedure covering any of the actions that may be appealed to the Board. In such instances, the employee normally must pursue a grievance through the negotiated grievance procedure. When a negotiated grievance procedure covers adverse actions and/or performance-based actions, however, the employee may use the negotiated grievance procedure or may file an appeal with the Board, but may not do both. An employee also has the choice of pursuing a grievance or an appeal to the Board when the negotiated grievance procedure covers an action appealable to the Board and the employee raises an issue of prohibited discrimination in connection with that action. (Under the terms of some union contracts, Postal Service employees may be able to pursue a grievance under the negotiated grievance procedure and also file an appeal with the Board.)

Approximately 2 million Federal employees, or about two-thirds of the full-time civilian work force, currently have appeal rights to the Board.

For the Board to have jurisdiction over any appeal of a personnel action, it must possess jurisdiction over both the action and the employee filing the appeal. Approximately 2 million Federal employees, or about two-thirds of the full-time civilian work force, currently have appeal rights to the Board. Employees eligible to appeal specific actions vary in accordance with the law and regulations governing those actions. In some cases, classes of employees, such as political appointees,

are excluded. Employees of specific agencies, such as the intelligence agencies and the General Accounting Office, are excluded with respect to certain actions.

Generally, employees who may appeal adverse actions and performance-based actions are those in the competitive service who have completed a probationary period and those in the excepted service (other than the Postal Service) with at least two years continuous service. Postal Service employees who may appeal adverse actions are preference-eligible employees with at least one year continuous service and certain Postal Service supervisors, managers, and employees engaged in personnel work.

Generally, employees who may appeal adverse actions and performance-based actions are those in the competitive service who have completed a probationary period and those in the excepted service with at least two years continuous service.

Probationary employees have very limited appeal rights. They may appeal a termination based on political affiliation or marital status, and they may appeal a termination based on conditions arising before employment on the grounds that the termination was not in accordance with regulations. Employees and annuitants may appeal OPM decisions affecting entitlements under the retirement systems. Certain actions, such as OPM suitability determinations and OPM employment practices, may be appealed by applicants for employment.

An appellant files an appeal with the appropriate MSPB regional office having geographical jurisdiction. An administrative judge in the regional office issues an initial decision. Unless a party files a petition for review with the Board, the initial decision becomes final 35 days after issuance. Any party, or OPM or the Special Counsel, may petition the full Board in Washington to review the initial decision. The Board's decision on a petition for review is final and constitutes final administrative action.

MSPB Original Jurisdiction

Cases that arise under the original jurisdiction of the Board include:

- Disciplinary actions brought by the Special Counsel alleging violation of the Hatch Act;
- Corrective and disciplinary actions brought by the Special Counsel against agencies or Federal employees who are alleged to have committed prohibited personnel practices, or to have violated certain civil service laws, rules or regulations;
- Requests for stays of personnel actions alleged by the Special Counsel to result from prohibited personnel practices;

- Certain proposed disciplinary actions brought by agencies against administrative law judges;

- Requests for review of regulations issued by OPM or of implementation of OPM regulations by an agency; and

- Informal hearings in cases involving proposed performance-based removals from the Senior Executive Service.

While the number of original jurisdiction cases that come before the Board is small, these cases often involve systemic issues with broad implications for both employees and agencies. Most original jurisdiction cases are Special Counsel disciplinary actions (both Hatch Act and non-Hatch Act).

The relationship of the Special Counsel to the Board is like that of a prosecutor to a judge; the Special Counsel prosecutes cases before the Board.

The relationship of the Special Counsel to the Board is like that of a prosecutor to a judge; the Special Counsel prosecutes cases before the Board. If, after an investigation, the Special Counsel determines that there are reasonable grounds to believe that a violation has occurred or may occur, the Special Counsel may bring a corrective action against an agency. The Special Counsel may bring a disciplinary action against an employee alleged to have committed a violation. The Special Counsel may also seek a stay of a personnel action if there are reasonable grounds to believe that the action was taken, or is about to be taken, as a result of a prohibited personnel practice.

In corrective action cases, the Board may order the agency to take necessary action to correct the prohibited personnel practice or pattern of such practices. In disciplinary actions other than those involving Hatch Act violations, the Board may order the employee's removal, reduction in grade, suspension, reprimand, debarment from Federal employment for a period not to exceed five years, or a fine up to $1,000. In Hatch Act cases involving Federal employees, the Board may order removal of the employee or, if the Board unanimously finds that removal is not warranted, may order a suspension of not less than 30 days. In Hatch Act cases involving state or local employees in federally-funded positions, the Board determines whether the employee's removal is warranted; it cannot impose a different penalty.

Original jurisdiction cases are processed at Board headquarters and do not go through a regional office.

Original jurisdiction cases are processed at Board headquarters and do not go through a regional office. Special Counsel cases and actions against administrative law judges are heard by the Board's Chief Administrative Law Judge, who issues a recommended decision. The parties are afforded an opportunity to file exceptions to the recommended decision, and the Board then issues a final decision in the matter. The Chief Administrative Law Judge also hears Senior Executive Service removal cases, but there is no action by the Board and any recommendation issued is not binding on the agency. The Board acts on Special Counsel stay requests and petitions to review OPM regulations.

Judicial Review

In appellate cases, the Board's final decision, whether it is an initial decision of an administrative judge that has become final or the Board's decision on a petition for review, may be appealed to the United States Court of Appeals for the Federal Circuit or, in cases involving allegations of discrimination, to a U.S. district court or the Equal Employment Opportunity Commission.

The Board's final decision may be appealed to the appropriate U.S. court, or, in "mixed cases," to the EEOC.

The Director of OPM may petition the full Board for reconsideration of a final decision, and may also seek judicial review of Board decisions that have a substantial impact on a civil service law, rule, regulation, or policy.

The Board's decisions in cases brought by the Special Counsel may be appealed to the U.S. Court of Appeals for the Federal Circuit, except in Hatch Act cases involving state or local government employees in federally-funded positions. State or local government employees affected by the Board's Hatch Act decisions may file appeals in the U.S. district courts.

The Board's decisions in other original jurisdiction cases may be appealed to the U.S. Court of Appeals for the Federal Circuit.

Special Studies and OPM Oversight

The CSRA made the Board responsible for conducting special studies of the civil service and other merit systems and included a specific requirement for an annual oversight review of the "significant actions" of OPM. The Board's legislative mandate regarding special studies and OPM oversight is broad in scope and gives the Board a great deal of discretion in deciding what to review and how to review it. The Board's reports on the results of its studies are addressed to the President and the Congress. They are also reviewed by a large secondary audience of Federal agency officials, employee and public interest groups, labor unions, academicians, and other individuals and organizations with an interest in public personnel administration.

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Potential study topics are solicited from a wide variety of sources outside the Board in the development of the Board's research agenda. The Board's studies, usually governmentwide in scope, are conducted through a variety of research methods, including mail and telephone based survey research, on-site systems reviews, written interrogatories, formal discussions with subject matter experts, computer-based data analysis, and reviews of secondary source materials.

After several years of issuing a single annual report on the significant actions of OPM, the Board in 1987 began issuing a series of reports, each covering a specific OPM significant action. Reports in the series have reviewed the revised OPM regulations that make performance a more significant factor in reduction-in-force actions, the impact on the merit principles of the Schedule B hiring authority for entry-level professional and administrative career employees, the expanded authority for agencies to make temporary appointments, and the operation of Federal performance management programs.

Subjects covered by the Board's merit system studies have included sexual harrassment in the workplace, whistleblower protection, college recruiting, and the SES.

The Board's first merit systems study, undertaken in response to a specific request from the Congress, was to determine the extent and the effect of sexual harassment in the Federal workplace. That landmark 1981 study was updated in a 1988 report that also received widespread attention. Other important Board merit systems studies have dealt with protection of "whistleblowers" and recruiting qualified college graduates for Federal employment. The Board has also issued a series of reports on the Senior Executive Service. Periodically, the Board surveys Federal employees to determine their views on a wide variety of civil service issues and reports the survey findings.

To raise the awareness level of the public administration community on the importance of the issues raised in Board studies, the reports are given wide distribution and are publicized in the media. Board staff accept public speaking engage-

ments and conduct special agency briefings on the findings and recommendations of Board reports. In addition, the Board responds annually to thousands of requests from all sources for copies of its reports.

The Board's data, conclusions, and recommendations from its reports are widely quoted and viewed as authoritative. Many of the recommendations contained in the reports have been adopted in whole or in part by the agencies covered by the Board's reviews, including OPM.

For Additional Information

To obtain additional information about the U.S. Merit Systems Protection Board, contact the Board regional office serving your area or: U.S. Merit Systems Protection Board, 1120 Vermont Avenue, NW., Washington, DC 20419. Be as specific as possible about the information you would like. This will save time and assure you a prompt and helpful response. Because the Board is prohibited by law from giving advisory opinions, Board personnel *may not* discuss with you the merits of any appeal you or another party may bring to the Board.

The Board's regulations are contained in the Code of Federal Regulations at 5 CFR, Chapter II, Parts 1200 through 1209. Copies of the Board's regulations are available on request at any Board office.

This publication is intended to provide general information only and is neither all-inclusive nor regulatory in nature. Additionally, changes in the Board's regulations and legislative enactments affecting the Board's jurisdiction or procedures may affect the accuracy of the information.

MSPB Regional Offices and Areas Served

Atlanta Regional Office

401 W. Peachtree Street, NW.
10th Floor
Atlanta, GA 30308
(404) 730-2751

Alabama, Florida, Georgia, Mississippi, North Carolina, and South Carolina

Boston Regional Office

10 Causeway Street
Room 1078
Boston, MA 02222-1042
(617) 565-6650

Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont

Chicago Regional Office

230 South Dearborn Street
31st Floor
Chicago, IL 60604-1669
(312) 353-2923

Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin

Dallas Regional Office

1100 Commerce Street
Room 6F20
Dallas, TX 75242-1001
(214) 767-0555

Arkansas, Louisiana, Oklahoma, and Texas

Denver Regional Office

730 Simms Street
Suite 301
P.O. Box 25025
Denver, CO 80225-0025
(303) 231-5200

Arizona, Colorado, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, South Dakota, Utah, and Wyoming

New York Regional Office

26 Federal Plaza
Room 3137
New York, NY 10278
(212) 264-9372

New-York, Puerto Rico, Virgin Islands, and the following counties in New Jersey: Bergen, Essex, Hudson, Hunterdon, Morris, Passaic, Somerset, Sussex, Union, and Warren

Philadelphia Regional Office

U.S. Customhouse, Room 501
Second & Chestnut Streets
Philadelphia, PA 19106-2904
(215) 597-9960

Delaware, Pennsylvania, Virginia (except cities and counties served by Washington Regional Office, see below), West Virginia, and the following counties in New Jersey: Atlantic, Burlington, Camden, Cape May, Cumberland, Gloucester, Mercer, Middlesex, Monmouth, Ocean, and Salem

St. Louis Regional Office

911 Washington Avenue
Room 615
St. Louis, MO 63101-1203
(314) 425-4295

Iowa, Kentucky, Missouri, and Tennessee

San Francisco Regional Office

525 Market Street
Room 2800
San Francisco, CA 94105-2789
(415) 974-9703

California

Seattle Regional Office

915 Second Avenue
Room 1840
Seattle, WA 98174-1001
(206) 442-0394

Alaska, Hawaii, Idaho, Oregon, Washington, and Pacific overseas areas

Washington Regional Office

5203 Leesburg Pike
Suite 1109
Falls Church, VA 22041-3473
(703) 756-6250

Washington, DC, Maryland, all overseas areas not otherwise covered, and the following cities and counties in Virginia: Alexandria, Arlington, Fairfax City, Fairfax County, Falls Church, Loudoun, and Prince William

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